

MENZIES (MIGRATION) [2017] AATA 2137 (23 OCTOBER 2017)

1.

CORRIGENDUM

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Samantha Jeannine Mastro Menzies
CASE NUMBER:	1614358
DIBP REFERENCE(S):	BCC2015/1926312
MEMBER:	Linda Holub
DATE OF DECISION:	23 October 2017
DATE CORRIGENDUM	
SIGNED:	9 November 2017
PLACE OF DECISION:	Sydney
AMENDMENT:	The following corrections are made to the decision:

2.

3. Paragraph 3, sentence 2, the Member has referred to cl.801.22; it should be replaced with cl.801.221.

4. Paragraph 9, the Member has referred to section 55F of the Act; it should be replaced with section 5F of the Act

5.

6.

Linda Holub
Member

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Samantha Jeannine Mastro Menzies

CASE NUMBER: 1614358

DIBP REFERENCE(S): BCC2015/1926312

MEMBER: Linda Holub

DATE: 23 October 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2)(a) of Schedule 2 to the Regulations
- cl.820.221 Schedule 2 to the Regulations
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Statement made on 23 October 2017 at 10:42am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Sharing of household responsibilities – Transition arrangements for their relocation

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, Schedule 2, cls 820.211, 820.221, r 1.15A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

- 1) This is an application for review of a decision of a delegate of the Minister for Immigration on 5 September 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
- 2) The applicant applied for the visa on 5 July 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
- 3) The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) and 801.22 because the delegate was not satisfied that the visa applicant and her sponsor are recognised as a de facto couple, there is no evidence that they see the relationship is a long-term one, that they draw emotional support and companionship from each other or that they have commitment to a shared life together.
- 4) The applicant appeared before the Tribunal on 16 October 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, the sponsor's mother, the sponsor's brother, and friends of both the review applicant and the sponsor. These friends are also the review applicant's employers.
- 5) The applicant was represented in relation to the review by her registered migration agent.
- 6) For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. *Information provided to the Tribunal*

- 7) The applicant provided further information to the Tribunal in support of the application. The included the following:

- Statutory Declarations/888 Forms from relatives and friends;
- Bank statements
- Copies of utility statements and rental documentation in joint names;
- Wedding photos of the parties and photographs with family and friends; and
- Statements regarding their relationship.

8. *Background*

- 8) The applicant is a citizen of Canada and is currently 31 years old. She entered Australia 24 July 2014 on a TZ-417 (working holiday) visa which allowed multiple entries. She was granted a Bridging visa in connection with her application for a Partner (Temporary) (Class UK) visa on 5 July 2015.

CONSIDERATION OF CLAIMS AND EVIDENCE

- 9) The issue in the present case is whether the spouse of the sponsor as defined by section 55F of the act and required by cl.309.211(2).

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

- 10) Clauses 820.211(2) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
- 11) 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

- 12) If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties have provided evidence that they are both over the age of 18. Since the application was first considered by the department's delegate, the parties have married. A copy of their marriage certificate was submitted to the Tribunal¹. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

- 13) The evidence put before the Tribunal is that the parties met when the sponsor was holidaying in Canada with two friends in late 2013/early 2014.
- 14) Consistent evidence was provided in writing and by both parties regarding their meeting on New Year's Eve of 2013 and the manner in which their relationship developed from there. The Tribunal heard that the parties had another opportunity to meet before the sponsor left Canada in January 2014. The parties communicated by various electronic means until the sponsor again returned to Canada in April 2014. A few months later they met again in Hawaii. This is confirmed by departmental records. They described the manner in which they started to have discussions about a future life together.
- 15) In forming an opinion whether the parties are in the married relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together or do not live separately and apart on a permanent basis as required by s.5F(2)(a)-(d), the Tribunal has had regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicants and review applicant's household and their commitment to each other as set out in r.1.15A(3).

¹AAT file, folio 94.

9. *Financial aspects of the relationship*

- 16) The Tribunal heard the parties have not bought any large assets together at this point but since they started living together in Australia after the review applicant moved here from Canada they have been establishing their lives together. They talked about the need for them to buy all the requirements to set-up a home including furniture. Further they made reference to the fact that until recently the review applicant did not obtain as much full-time work as she had been promised by her former employer. As a consequence they were substantially reliant on these sponsor's income. The sponsor has a car which he has had for several years. An additional major expense was their wedding. In written and oral evidence they also talked about the fact that they have two dogs and I have had some financial cost resulting from them.
- 17) Both parties explained that although they have not yet accumulated savings they have both read a book given to them by the sponsor's mother, called the *Barefoot Investor*. They also talked about the fact that they are developing a savings plan in order to be able to purchase a home, in the not too distant future. Part of that plan is their imminent move to Cessnock in relation to the sponsor's employment.
- 18) In written material before the Tribunal, the parties clearly indicated the manner in which they share the financial costs of their lives which take into account their respective incomes
- 19) The parties submitted extracts from joint bank account statements showing numerous transactions from 2014, 2015 and 2016².
- 20) The information before the Tribunal regarding the financial aspects of the relationship support a finding that the parties are in a genuine and continuing relationship.

10. *Nature of the household*

- 21) The review applicant came to Australia in July 2014. Both parties gave evidence that they spent several weeks in Perth, where the sponsor lived at the time visiting various places and meeting friends and family of the sponsor. They then travelled to Sydney over the course of the following week. Both parties had obtained work in Sydney prior to their move as they intended to establish their lives in Sydney. They considered this a suitable location at that time because these sponsor works in the construction industry.
- 22) The review applicant submitted documentation regarding the properties they rented since moving to Sydney and in relation to their tenancy applications for a new rental property as they relocate to Cessnock from October 2017³.
- 23) Convincing evidence was also provided regarding their living arrangements and the sharing of their household responsibilities.
- 24) The Tribunal accepts the evidence as to the nature of the parties' household is consistent with the relationship claimed.

11.

12. *Social aspects of the relationship*

²AAT file, folios 40-50, 66-68, 78-83, 164-169, 175-177,

³AAT file, folios 27, 58-59, 124-137, 160, 212-217.

- 25) The Tribunal has considered the evidence in relation to the social aspects of the relationship including whether the parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
- 26) The evidence before the Tribunal is that the parties celebrated their wedding with family, friends in Sydney. The review applicant sister travelled from Canada to attend the wedding. The applicants explained to the Tribunal that they both considered a wedding to be important both in terms of the tradition and also the opportunity to celebrate their relationship with loved ones. Photographic evidence of the wedding was provided⁴.
- 27) The Tribunal heard evidence from the sponsor's mother, Helen BADGER, about the manner in which the sponsor talked about the review applicant after he had first met her at the end of 2013. She noted that the way he talked about her and treated her clearly demonstrated that his feelings for the review applicant were different to those he had expressed previously with other girlfriends. The sponsor's mother also discussed the fact that she sensitively questioned his feelings for the review applicant but also encouraged him to pursue them, for example, his return trip to Canada in April 2014. The sponsor's mother gave evidence that she was reassured when both the review applicant and the sponsor met on the next occasion of the parties getting together in May-June 2014 in Hawaii. She explained that she was reassured that there was a mutual commitment and the interest was not one-sided. The sponsor's mother also talked about her interactions with the review applicant's mother and sister and their visit to Australia.
- 28) The sponsor's brother, Clancy BAIN, provided evidence to the Tribunal regarding the early discussions he had with his brother following his return from Canada in early 2014. The sponsor's brother explained that it was apparent to him that the sponsor's feelings and intentions for the review applicant were manifestly different to that which he had expressed in other relationships. He also referred to his very close relationship with the review applicant and stated that he considers her as close as his own sister and in fact introduces her as such. He referred to how well they get along, that they often chat independently of the sponsor and that he is about to travel to Canada and will be staying with the review applicant's sister. He noted that the two families are now linked.
- 29) The Tribunal was also heard evidence from a close friend of the parties, Laura WATTS. She described the manner in which she met the review applicant, the way in which their friendship, the way in which she and her husband spend time together with the parties as two couples, the activities they undertake, and the important roles they play in each other's lives, including celebrating Christmas together.
- 30) Further oral evidence was taken from the previously mentioned witness' husband, John BOTELLA, who is both a friend of the review applicant and sponsor and also the review applicant's employer. He provided evidence consistent with that of his wife, and also talked about the relationship between the sponsor and the review applicant.
- 31) Based on the extensive oral and written evidence, the Tribunal was satisfied that the parties represent themselves to other people, including family and friends as being a couple. The Tribunal decided that they did so at the time of the application and continue to do so at the time of the decision.

13. *Nature of persons' commitment to each other*

⁴ AAT file, folios 83-90.

- 32) The Tribunal has considered the evidence in relation to the nature of the persons' commitment to each other including the duration of the relationship, the length of time they have lived together the degree of companionship and emotional support they draw from each other and whether they see the relationship is long-term.
- 33) The parties gave evidence that they have decided to move to Cessnock when a work opportunity came arose for the sponsor. They both separately indicated that such a move towards provide them the sort of lifestyle that they both desire as they give consideration to starting a family. In addition, a move out of Sydney will provide them with the opportunity to have more space for the two dogs. A further consideration that is important for them going forward is the lower cost of housing with a move out of Sydney. These sponsor and the review applicant talked about their strong interest and plan to save money in order to be able to buy their own home in the not too distant future. Evidence was provided about the possibility of the review applicant being able to maintain her current accounting role after the move.
- 34) The Tribunal heard consistent evidence from the parties regarding the transition arrangements they have for their relocation, their plans to start looking for rental accommodation, and the manner in which they will transition from their current rental property in Sydney. They also acknowledged that setting up again in a new environment as they did when they moved to Sydney, takes effort and requires them to work together closely to establish a new friendship group and to explore and engage in activities that they are both interested in.
- 35) The Tribunal was satisfied their financial and emotional support for each other is ongoing. Each appears to draw a significant amount of support and companionship from the other and each appears to see their relationship as long-term.

14. Overall assessment

- 36) The Tribunal found that the review applicant gave evidence in an open and straightforward manner. Further the evidence of the review and visa applicants was consistent. Despite the delegate's concerns at the time of the decision, the Tribunal is of the view that the extensive further information made available to the Tribunal and the consistent oral evidence presented by the parties and witnesses, as well as the other supporting documentation was persuasive and the Tribunal is satisfied that the parties are generally committed to their marriage.
- 37) On the basis of the above the Tribunal finds that at the time of application and at the time of decision, the parties were not living separately and apart on a permanent basis and that they saw their future as a long-term one. The Tribunal is also satisfied that at time of application and time of decision that the parties continue to have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship is genuine and continuing.
- 38) Given these findings, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
- 39) Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.
- 40) Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

41) The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(a) of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations.

Linda Holub
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).